

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band)	WT Docket No. 07-195
)	
Service Rules for Advanced Wireless Services in the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz and 2175-2180 MHz Bands)	WT Docket No. 04-356

**COMMENTS OF THE
INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE**

To the Commission:

The Independent Telephone & Telecommunications Alliance (ITTA) respectfully submits these comments in response to the Commission’s *Further Notice of Proposed Rulemaking (FNPRM)* that seeks to design service rules for the Advanced Wireless Service (AWS) spectrum.¹ ITTA members are mid-size local exchange carriers that provide a broad range of high-quality wireline and wireless voice, data, Internet, and video services to 31 million access lines in 45 states.

I. INTRODUCTION.

ITTA is concerned with the Commission’s proposal to create a single 25 MHz nationwide license in the 2155-2180 MHz band (the “AWS-3” band) that will be conditioned on the provision of “free” broadband service and content filtering.² ITTA’s members share the Commission’s goal of promoting “the deployment and ubiquitous availability of broadband

¹ *Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band, WT Docket No. 07-195, Service Rules for Advanced Wireless Services in the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz and 2175-2180 MHz Bands*, WT Docket No. 04-356, *FNPRM*, FCC 08-158 (rel. June 20, 2008).

² *FNPRM* at para. 3.

services” in America and have already invested heavily to achieve this common goal.³ The Commission should not, however, distort the marketplace and undermine the efforts already underway by mandating an unproven and economically disruptive broadband business model that could drive existing broadband competitors from the marketplace. Moreover, the proposal to impose a content filtering requirement on a broadband Internet access service provider is legally unsound, unnecessary, and should be abandoned.

II. THE COMMISSION MUST ENSURE THAT PROVIDERS SERVING RURAL AREAS HAVE EQUITABLE ACCESS TO LICENSES.

The Commission’s proposal to award a single license will not result in adequate service in rural areas. A single Nationwide licensee could fulfill its build-out requirements by focusing only on major urban areas and regions adjacent to major highways, leaving spectrum in insular areas unused. The auction should instead be structured to encourage the participation of entities smaller than Tier 1 wireless carriers that are best positioned to bid for a Nationwide licenses. Auctioning the spectrum on in smaller allotments would promote opportunities for smaller carriers with an interest and historic record of serving rural areas to participate in the auction and deliver new services to consumers there. If the Commission nonetheless proceeds with a single license model, then partitioning should be encouraged by requiring the licensee to include rural areas in its build-out requirement. If those areas are yet unserved at the end of the build-out period, then mandatory partitioning to carriers serving rural areas should be imposed. Finally, carriers serving rural areas should have the right to enter into wholesale agreements with the licensee for voice, data, and media application roaming. These measures will ensure that rural

³ *FNPRM* at para 1.

consumers have access to new services provided by carriers that are committed to serving those areas.

III. A “FREE” BROADBAND MANDATE WILL DISTORT THE MARKETPLACE FOR BROADBAND SERVICE.

ITTA’s members have committed billions of dollars to the deployment of broadband services in the less-dense, high-cost, rural areas where many of their customers reside. Notwithstanding the efforts already undertaken and the progress made, the Commission now proposes to require the holder of the nationwide AWS-3 license to provide “free” broadband service “with engineered data rates of at least 768 kbps downstream using up to 25 percent of the licensee’s wireless network capacity.”⁴ ITTA shares the Commission’s goal of ubiquitous broadband service for all Americans, but submits that mandating “free” broadband service will distort the marketplace and undermine the existing, and future, broadband deployment efforts in this country. Existing practices have resulted in strong broadband deployment trends, especially in rural areas. As noted by the Federal-State Joint Board for Universal Service, “RLECs have done a commendable job of providing voice and broadband services to their subscribers.”⁵ Carriers have had proper incentives to invest and offer a range of price-point and service-level offerings to consumers. A broadband competitor with a mandate to provide a service at a price of zero would skew market incentives.

The unintended consequences of the Commission’s “free broadband” proposal could well be increased costs for consumers who require higher-capacity service. Currently, economies of scale that enable reasonably priced advanced offerings can be achieved by allocating costs across

⁴ *FNPRM* at para. 3 and Appendix A at 24-25 (proposing 47 C.F.R. § 27.1191).

⁵ *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service: Recommended Decision*, WC Docket No. 05-337, CC Docket No. 96-45, FCC 07J-4, at para. 39 (2007).

a large and wide range of users. Where free broadband is available, however, the likelihood is that users with lower-end needs would migrate toward the free service provider, leaving incumbent providers to serve those with needs for higher-capacity lines, but with a smaller customer base among which fundamental costs can be shared. The net effect could, ironically, price some users out of the market, laying waste to investment that has already been made to bring broadband to the vast majority of Americans. Moreover, by increasing higher-capacity costs and driving users toward lower-end service, small businesses that rely on unaffordable higher-capacity services would suffer either increased costs or an inability to obtain service they need at an affordable rate. In the long term, the consequences could be even more severe, as the mandated business plan for the AWS-3 licensee will likely fail, like other “free service” business models to date,⁶ possibly leaving consumers with no broadband access options. This worst-case scenario is most likely in rural areas, where broadband networks are most expensive to build.

ITTA’s grave concerns about the failure of this free-service proposal are based on real-world examples. Most recently, the Commission intended to promote the deployment of a Nationwide-interoperable broadband network for use by public safety by placing public/private partnership requirements on the D-Block license based largely on the business plan of one company. The license conditions, however, proved fatal as the license failed to attract a winning bidder.⁷ Similar results have occurred when the Commission has tried to customize rules to

⁶ See, e.g., *Ex Parte* Letter from Christopher Guttman-McCabe, CTIA – The Wireless Association, to Marlene H. Dortch, Secretary, FCC (dated June 5, 2008) at 5-7 (“The Commission should take note that those businesses that have tried to provide free services like the broadband service under consideration here have failed in the marketplace.”) (CTIA *Ex Parte*).

⁷ The ensuing reviews showed that potential bidders were unable to attract the necessary capital or were otherwise deterred due to the stringent conditions placed on the license. The Commission is now faced with unenviable task of re-examining the D-Block service rules to find out whether there can be an appropriate balance between commercial viability and satisfying the needs of public safety.

accommodate the business plans of a single company.⁸ The Commission should not make the same mistake with the AWS-3 spectrum.

More fundamentally, the FCC has never price-regulated an information service offering, and it should not do so now by requiring the AWS-3 licensee to provide a “free” service. Implementing new price regulations is fundamentally incompatible with the deregulatory mandate of the Telecommunications Act of 1996.⁹

The Commission must not supplant the role of the marketplace by imposing a particular business model on the licensee of the AWS-3 spectrum – particularly one founded on a fundamentally uneconomic model. Broadband services have emerged successfully because technical and marketplace development have occurred largely outside the realm of regulatory governance. The public interest is best served if the Commission continues to allow “competitive marketplace conditions to guide the evolution of broadband Internet access services.”¹⁰

IV. A CONTENT FILTERING REQUIREMENT RAISES CONSTITUTIONAL AND STATUTORY CONCERNS AND IS UNNECESSARY.

ITTA has serious concerns over the Commission’s proposal to require the AWS-3 licensee to employ a content network filter on the “free” broadband service that “blocks images and text that constitute obscenity or pornography” and that blocks “images or text that otherwise would be harmful to teens and adolescents . . . as measured by contemporary community standards.”¹¹ Not only does the condition raise Constitutional and statutory concerns, but it is

⁸ See CTIA Ex Parte at 3-4 (discussing the experiences with MVDDS, 1670-1675 MHz and the DBS Orbital Slot at 61.5 degrees).

⁹ See Telecommunications Act of 1996, P.L. 104-104, 100 Stat. 56 (1996).

¹⁰ Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14898 at para. 85 (2005).

¹¹ FNPRM at para. 3 and Appendix A at 25-26 (proposing 47 C.F.R. § 27.1193).

also unnecessary when dealing with a broadband Internet access service provider in a competitive marketplace.

The content filtering condition is unlikely to survive a Constitutional challenge. The content-based regulation clearly falls within the strict scrutiny standards of the First Amendment, which requires that the regulation be the least restrictive means of furthering a compelling government interest.¹² Given that the filtering is “always on,” even when children are unlikely to be on-line, and that user-based filtering technologies are available, it is difficult to see how the Commission’s proposed condition could meet this standard. The terms used by the Commission regarding the type of content that is to be blocked are also impermissibly vague and would have a “chilling effect on free speech,” further raising Constitutional concerns.¹³

The Commission lacks statutory authority for the content filtering condition. Because two-way broadband access is not a “broadcast service,” the Commission cannot take shelter under its authority in the broadcasting arena to regulate obscenity, indecency, and profanity.¹⁴ Indeed, the condition is squarely at odds with Section 326 of the Communications Act of 1934, as amended, that expressly prohibits the Commission from censoring wireless communications.¹⁵

Finally, the condition is unnecessary, and making access providers responsible for filtering content is misplaced. If parents demand the ability to block the content of their choice to protect their children, then the market will satisfy the demand with user-based filtering capabilities to the extent that it has not done so already. The Commission does not need to

¹² See U.S. Const. amend I; *Ashcroft v. ACLU*, 542 U.S. 656, 670 (2004); *US v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 825 (2000); *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

¹³ *Reno*, 521 U.S. at 871-72 (citations omitted).

¹⁴ See 18 U.S.C. § 1464.

¹⁵ See 47 U.S.C. § 326.

regulate in a competitive marketplace, especially when dealing with an information service, absent evidence of market failure.

V. CONCLUSION

For the reasons discussed above, ITTA urges the Commission to (a) reject a single nationwide license model and encourage participation by smaller carriers, (b) not condition the AWS-3 license on the provision of “free” broadband service, and (c) reject mandatory content filtering conditions. Broadband service is already being deployed at a reasonable and timely pace, the Commission should therefore continue to let the market forces work and refrain from tinkering with the market to accomplish the goals that we all share.

Respectfully submitted,

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